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IN THE

Supreme Court of the United States

KLAMATH DRAINAGE DISTRICT; KLAMATH WATER USERS PROTECTIVE ASSOCIATION; SAM HENZEL; HENZEL PROPERTIES, LTD.,

Petitioners,

v.

ROGER PATTERSON; KARL E. WIRKUS; ELUID MARTINEZ; PATRICIA BENEKE; BRUCE BABBITT; UNITED STATES BUREAU OF RECLAMATION; UNITED STATES OF AMERICA; PACIFICORP; YUROK TRIBE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court, pursuant to Supreme Court Rules 10(a) and 16.1, should summarily vacate a section of a Ninth Circuit decision recognizing the Bureau of Reclamation's power and duty to reallocate water in favor of unadjudicated tribal water rights claims, and further recognizing a priority date of time immemorial for certain claimed tribal rights, based on a misreading of an earlier decision of that court in which the rights of those tribes were not implicated, where these issues were in no way presented, briefed, or argued before the court in this case, and where the decisions of this Court strongly counsel restraint by federal courts in the determination of water right priorities.

PARTIES TO THE PROCEEDINGS

All of the parties below are listed in the caption. Petitioner Klamath Water Users Protective Association is a not-for-profit corporation and has no related corporate entities. Henzel Properties, Ltd., is not publicly traded and has no related corporate entities.

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PETITION FOR A WRIT OF CERTIORARI

Klamath Drainage District, Klamath Water Users Protective Association, Sam Henzel; and Henzel Properties, Ltd., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND JUDGMENTS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-13a) is published at 204 F.3d 1206 (9th Cir. 2000). The order of the court of appeals denying Petitioner's petition for rehearing with suggestion for rehearing *en banc* and amending the original opinion is reported at 203 F.3d 1175 (9th Cir. 2000). The Memorandum Decision and Order of the district court (Pet. App. 14a-26a) is reported at 15 F. Supp. 2d 990 (D. Ore. 1999)

JURISDICTIONAL STATEMENT

The jurisdiction in the district court over claims against the United States and federal officers and agencies was invoked pursuant to 28 U.S.C. §§ 1331, 1346(a)(2), 1361, 1491, 2201-02 and 43 U.S.C. § 390uu. Jurisdiction over claims against PacifiCorp was invoked pursuant to 28 U.S.C. §§ 1331 and 1367. The judgment of the court of appeals was entered September 9, 1999. The order denying the petition for rehearing with suggestion for rehearing *en banc* and amending the original judgment was entered January 28, 2000. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTES INVOLVED

Section 8 of the Reclamation Act of 1902, Act of June 17, 1902, 32 Stat. 388 is codified in two sections of the United States Code.

43 U.S.C. § 372 (1994) provides:

Water right as appurtenant to land and extent of right

> The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land

irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

43 U.S.C.§ 383 provides:

Vested rights and State laws unaffected

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the Control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

The McCarran Amendment, 43 U.S.C. § 666(a) provides:

Suits for adjudication of water rights

(a) Joinder of United States as defendant; costs

Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to

the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

STATEMENT

This petition is filed on behalf of irrigators[1] with rights to water delivered through the Klamath Project in Oregon,[2] who ask this Court to summarily vacate, pursuant to Supreme Court Rules 10(a) and 16.1, one section—three paragraphs—of a decision of the United States Court of Appeals for the Ninth

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[1] The petitioners who are irrigators in the Klamath Project use water from Upper Klamath Lake and the Klamath River. Petitioner Klamath Water Users Protective Association does not use water or claim to have water rights.

[2] Vested water rights for irrigation and domestic use in the Klamath Project are recognized in the Klamath River Basin Compact Act of August 30, 1957, 71 Stat. 497, Art. III. Settlers began irrigation in this area in the nineteenth century. In 1902, Congress enacted the Reclamation Act, Act of June 17, 1902, ch. 1093, 32 Stat. 388 (codified as amended at 43 U.S.C. § 372 *et seq.* (1994)), to encourage further western settlement and agricultural development by providing federal financing for irrigation projects. In 1905, the state of Oregon enacted legislation making water available for use in Reclamation projects, 1905 Or. Laws Ch. 228, and specifically authorizing storage of water for reclamation and irrigation purposes within Upper Klamath Lake. Ch. 5, Or. Laws of 1905, Sec. 1. That same year Congress specifically authorized the development of the Klamath Irrigation Project, Act of February 9, 1905, 33 Stat. 714. Early construction on the Project consisted of building canals and extending existing canals. Project water at that time was drawn from several lakes and rivers in the area, and pre-existing water rights were acquired to support it. Since the initiation of the Project, Reclamation has entered into 250 contracts, providing for delivery of water, with various individuals, irrigation districts, drainage districts or similar entities for use by approximately 230,000 acres of irrigated land. (Pet. App. 16a.) In some instances, water use by districts and individuals derives from appropriative uses tracing back to the nineteenth century.

Circuit.[3] The section at issue purports to resolve important questions concerning the existence and priority of water rights in the Klamath River Basin which are no part of the dispute before that court. First, without the benefit of briefing or argument on the issue, the Ninth Circuit has decided a hotly disputed question of Bureau of Reclamation authority. Second, it has characterized the water rights and priorities of several Indian tribes based on a clear misstatement of its own prior precedent. Petitioners seek a summary order remanding with instructions to vacate this portion of the opinion, as addressing issues not presented for decision and including indisputable factual errors, concerning matters of great importance to the determination of water rights throughout the West, and in the Klamath River Basin, in particular.

The Basin straddles the Oregon-California border, from Crater Lake in the north to the Trinity River in the south, and from Klamath and Modoc Counties in the east to the Pacific Ocean. See Exhibit 1 (Map of Klamath River Basin) (Pet. App. 27a). It covers roughly ten million acres and has been statutorily divided into upper and lower basins of nearly equal size. *See* Klamath River Basin Compact of August 30, 1957, 71 Stat. 497, Art. II.B. Within the upper basin, at the foot of Upper Klamath Lake, is the Link River Dam, from which water flows into the Klamath River. The Dam is owned by the Bureau of Reclamation and operated under contract by PacifiCorp. The interpretation of a 1956 contract for the operation of that Dam was at issue in this case.[4]

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[3] The section at issue is Section II.B.3, headed "Indian Water Rights." (Pet. App. 12a-13a)

[4] PacifiCorp is the second operator of the Dam under contract with the Bureau of Reclamation. In 1917, the United States and the California Oregon Power Company (COPCO) entered into an agreement whereby COPCO would construct the Link River Dam at the mouth of Upper Klamath Lake to store water for irrigation and downstream power generation, and then convey title to the Dam to the United States. (Pet.

In Oregon, upstream from the Lake, at the northeastern end of the upper basin, is the Williamson River watershed, within the former reservation of the Klamath Tribe, whose rights to instream flows in that watershed were established and prioritized by the Ninth Circuit in *United States v. Adair*, 723 F.2d 1394, 1397 (9th Cir. 1983). In California, at the far southwestern edge of the lower basin, near where the Klamath enters the Pacific Ocean, are the reservations of the Yurok and the Hoopa Indians, whose rights to water from the Klamath have never been addressed by any court prior to this case. (*See* Pet. App. 27a)

The State of Oregon is conducting a general stream adjudication that will determine and quantify rights and priorities to use waters of the Klamath River system in Oregon. The adjudication was delayed pending the outcome of *United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994), in which the Ninth Circuit held that Oregon's system of adjudication was within the waiver of sovereign immunity of the McCarran Amendment, 43 U.S.C. § 666, and thus that federal agencies and the Klamath Tribe must file claims in that adjudication. By 1997, all claims had been filed in that case.

Until the early 1990s, the Link River Dam was operated principally to ensure adequate water for irrigation in the Klamath Project, which lies southeast of the Lake. ER 59-60, 78-79.[5] Various Indian tribes, including the Yurok and Hoopa

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App. 15a) The Dam was completed in the early 1920s. The fifty-year contract allowed COPCO to operate the Dam; this contract was renewed in 1956 and remains in effect until 2006. *Id.* COPCO was succeeded by PacifiCorp subsequent to 1956. Under the terms of the 1956 contract, PacificCorp may regulate the elevations of Upper Klamath Lake within specified limits and subject to certain requirements set by the Bureau of Reclamation. (Pet. App. 16a)

[5] "ER" refers to Excerpts of Record in the court below; "SER" to Supplemental Excerpts of Record; "FER" to Further Excerpts of Record.

Tribes, then made demands on the Bureau of Reclamation to provide higher flows in the Klamath River, asserting water rights to support tribal fisheries. ER 61-63. Also, the Klamath Tribe of the upper basin claimed to have a water right in Upper Klamath Lake itself, and insisted that more water should be retained in the Lake to benefit the Klamath Tribe's fisheries. During the early 1990s, the Bureau of Reclamation began exploring new approaches to managing the Dam in light of these claims.

This effort led, in 1997, to a new interim plan for Dam management that would first allocate fixed quantities of water to high instream Klamath River flows and high Upper Klamath Lake levels, and leave to the Klamath Project irrigators only the water left over after these requirements were met. As a result of the plan, the Bureau of Reclamation and PacifiCorp entered into an agreement modifying the 1956 contract.[6] In June 1997, petitioners filed suit to challenge that modification. The suit was brought against the United States, the Bureau of Reclamation, several Government officials, and PacifiCorp, based in part on the assertion that petitioners were third party beneficiaries under the 1956 contract, so that it could not be amended without securing their approval. (Pet. App. 5a)

Following denial of petitioners' requested temporary restraining order, all of petitioners' remaining claims were ultimately dismissed, on petitioners' motion for dismissal without prejudice and on mootness grounds. (Pet. App. 14a; ER 587-88.) The case proceeded on what the district court

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[6] The modification was agreed to after PacifiCorp declined to implement Reclamation's 1997 interim plan for operation of the Dam. This refusal resulted from a number of factors including, as reported by the district court, the fact that the plan required PacifiCorp to violate requirements of its FERC license pertaining to minimum flows in the river during September. (Pet. App. 18a) The challenged amendment was a short-term modification of the 1956 contract directing implementation of the interim plan with FERC's concurrence. *Id.*

characterized as "the sole remaining substantive matter" of PacifiCorp's amended counterclaim seeking "a declaration of petitioners' rights under the 1956 contract." (Pet. App. 14a) On cross motions for summary judgment, the district court ruled for PacifiCorp and against petitioners, holding that petitioners had no rights under the 1956 contract, and in the process adopted verbatim the three declarations requested by PacifiCorp:

> (1) plaintiffs are not third party beneficiaries to the 1956 contract with respect to irrigation water, and the contract creates no rights in plaintiffs to irrigation water; (2) the 1956 contract may be amended with regard to PacifiCorp's rights and obligations to operate Link River Dam without plaintiffs' consent; and, (3) PacifiCorp is not liable to plaintiffs under the 1956 contract for implementing Federal defendants' water allocation decisions for the Klamath Project.

(Pet. App. 25a-26a)

The district court reached these conclusions by reviewing the terms of the 1956 contract and finding that petitioners were indirect and incidental beneficiaries of the contract, and thus were not entitled to third party beneficiary status. The court also observed that petitioners' rights to receive water through the Klamath Project derived not from the 1956 contract, but primarily from individual repayment contracts with the federal government, which contained a clause holding the government harmless in the event of a shortage. (Pet. App. 20a-24a) Under these circumstances, the court concluded that allowing petitioners to bring suit under the 1956 contract "would be inconsistent and is not supported by the record." (Pet. App. 25a)

In a final paragraph immediately preceding the section of the decision labeled "Conclusion," the district court listed a number of other factors weighing against recognizing rights in

petitioners to sue as third party beneficiaries under the contract. The last of these, as stated by the district court, was that

> [petitioners'] rights to water in the basin, whether as third party beneficiaries to the 1956 contract or under their individual repayment contracts with Reclamation, are subservient to senior tribal water rights and to subsequent legislative enactments by Congress, such as the Endangered Species Act.[7]

(Pet. App. 25a)

On appeal to the Ninth Circuit, petitioner expressly urged the court to confine itself to the issue of contract construction, which the district court had described as the sole remaining issue in the case, and to clarify that the lower court's language set forth above did not resolve water rights issues that were not presented:

> Water rights matters are complex, sensitive, and being adjudicated in another forum. They were not in issue here, where the question is whether plaintiffs have rights under the 1956 contract with respect to PacifiCorp's operation of the dam. Plaintiffs urge this Court to take all necessary steps to ensure that the holding in this case is limited to the contract in issue, and cure the district court's uncareful repetition of conclusory assertions that were not litigated.

Appellants Opening Brief at 61. This request was fully consistent with the language of PacifiCorp's counterclaim,

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[7] The other factors noted in the same paragraph were that "Article 15 limits intended beneficiaries to the parties to the contract;" that Petitioners' arguments, if accepted, would mean that "most users of Klamath Project water would stand as intended third party beneficiaries to the . . . contract;" and that "the 1956 contract did not give [petitioners] water rights superior to those in [petitioners'] individual repayment contracts with Reclamation." (Pet. App. 25a)

which sought nothing other than a declaration of petitioners' rights arising under the 1956 contract (Pet. App. 14a), and with the district court's summary of the issue presented and its own ruling. (Pet. App. 14a, 25a-26a)

The United States' opposition brief agreed with petitioners' definition of the issue presented:

> The issue presented in this appeal is straight-forward: Does a 1956 contract between [the Bureau of Reclamation] and [Pacificorp's predecessor] give appellants . . . rights to irrigation water under the Contract as third party beneficiaries?

U.S. Br. at 3.[8] In response to petitioners' concern about the single sentence of the district court opinion referencing tribal water rights, the United States acknowledged that the district court may have "made statements regarding issues not in dispute or outside its jurisdiction," but said that this Court need not concern itself with correcting them because such "statements are not binding." *Id.* at 58 n.32.

In a brief submitted to the Ninth Circuit as an intervenor, the Yurok Tribe argued that the district court's reference to "senior tribal water rights" should be viewed as a recognition "(1) that the Yurok and other Klamath Basin tribes hold vested, existing reserved water (and fishing) rights," and (2) that the "Bureau of Reclamation must be allowed the discretion necessary to protect and satisfy them," to the extent senior rights "can be estimated . . . based on the best scientific information available." Yurok Br. at 32. The Yuroks emphatically denied that the district court's language in this respect was dicta, *id.* at 33, and vigorously argued to the Ninth

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[8] This repeated the United States' position, asserted in the district court, that "[t]he only rights at issue before the Court are those contractual rights which Copco and the United States intended to create in their agreement over forty years ago." ER 517.

Circuit that "the Yurok Tribe has an aboriginal water and fishing right, reserved and vested no later than 1855, that is senior to the Irrigators' water rights." *Id.* at 43.

The United States Court of Appeals for the Ninth Circuit affirmed the judgment of the district court. The court stated at the outset that the case was limited to "a basic contract issue: whether [petitioners] are third-party beneficiaries to [the 1956 contract]," (Pet. App. 2a) and ruled without qualification that they were not:

> Although the Contract operates to the Irrigator's benefit by impounding irrigation water, and was undoubtedly entered into with the Irrigators in mind, to allow them intended third party beneficiary status would open the door to all users receiving a benefit from the Project achieving similar status, a result not intended by the Contract. Accordingly, we hold that the Irrigator's are not intended third party beneficiaries.

(Pet. App. 9a-10a)

Thereafter, the court proceeded to address several additional issues.[9] In a separate section labeled "3. Indian Water Rights,"

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[9] First, in a subsection labeled "1. Control of the Dam," the court stated that the contract evinced "the unmistakable intent that Reclamation controls the Dam." (Pet. App. 10a-11a) The court explained that this section was a response to petitioners' argument that the district court erred in granting PacifiCorp immunity from suit because PacifiCorp and not Reclamation has the right to control release of water from the dam. Second, in a subsection labeled "2. Endangered Species Act," offered as a response to petitioners' argument that PacifiCorp had no duty to operate the dam so as to comply with the Endangered Species Act, the court stated that "[b]ecause Reclamation retains authority to manage the Dam, and because it remains the owner in fee simple of the Dam, it has responsibilities under the ESA as a federal agency." (Pet. App. 11a-12a) Accordingly, the court "[held] that the district court did not err in concluding that Reclamation has the authority to direct dam operations to comply with the ESA." *Id.* Neither of these sections is challenged by this petition.

ostensibly offered in response to petitioners' assertion that tribal water rights were irrelevant to the contract construction issue, the court went far beyond the general observation of the district court to address specifically the issues of Bureau authority and tribal water rights. (Pet. App. 12a) The court cited its own decision in *United States v. Adair*, 723 F.2d at 1408-11, 1415, which it described parenthetically as "holding that the Klamath Basin Tribes hold implied water rights to support hunting and fishing rights guaranteed by treaties between Tribes in Oregon and California and the United States." (Pet. App. 12a) The court proceeded to state that:

> We have held that water rights for the Klamath Basin Tribes "carry a priority date of time immemorial." *Adair*, 723 F.2d at 1414. Because Reclamation maintains control of the Dam, it has a responsibility to divert the water and resources needed to fulfill the Tribes' rights, rights that take precedence over any alleged rights of the Irrigators.

(Pet. App. 12a-13a)

Petitioners, with the direct support of an *amicus* brief by the State of Oregon, sought panel and *en banc* rehearing, asserting specifically that the panel had gone "far beyond" the issue of petitioners' rights under the 1956 contract, to decide questions "not joined by the pleadings" or litigated by the parties.[10] Petition for Rehearing or Modification at 4. Petitioners asserted, first, that the panel should not have addressed the issue "of national significance" concerning whether Reclamation has authority to "direct operation of the Dam to serve asserted [but as yet unadjudicated] Tribal water rights."

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[10] The rehearing petition challenged the panel decision in other respects as well, including its resolution of the third party beneficiary issue and its discussion of Reclamation's obligations under the Endangered Species Act.

Id.[11] Petitioners noted further that the court erroneously characterized its own prior decision in *United States v. Adair*, in saying that that decision addressed the water rights of "the Klamath Basin Tribes" "in Oregon and California," which "carry a priority date of time immemorial." (Pet. App. 12a) Petitioners pointed out that the panel's reference on its face encompassed the tribes of the Klamath Basin in both states, including the Klamath Tribe and the Yurok and Hoopa Indians, but that the *Adair* case addressed water rights of only the Klamath Tribe in the Williamson River watershed in Oregon. Rehearing Petition at 5. The Yuroks and Hoopas were not parties in *Adair*, and nothing in the decision suggested that their rights were in any way addressed.

Petitioners further noted that even as to the Klamath Tribe, *Adair* addressed only the right to instream flows in the Williamson River watershed, and did not deal with any claimed water rights of that Tribe in Upper Klamath Lake, which Reclamation had recognized in the interim plan endorsed by the panel. Rehearing Petition at 5.[12] In addition, during the

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[11] This concern was echoed by the State of Oregon in its *amicus* brief submitted on rehearing:

> The extent of Reclamation's authority to allocate water within its projects to serve . . . tribal trust obligations, and the relationship between those obligations and water rights acquired or decreed under state law, [is an] issue[] of enormous significance throughout the western states . . . Oregon's point is that [that issue was] not litigated on the merits by the other parties in this case, nor is [its] resolution necessary to resolve the third-party beneficiary issue, . . . the only legal issue before this court.

Amicus Brief of State of Oregon at 9 (Oregon Br.). Because the issue had not been presented or briefed earlier, this was the first and only filing in the case by the State of Oregon.

[12] A tribal right to have water remain in the Williamson River is highly complimentary to the rights of petitioner irrigators, because it increases the amount of water flowing into Upper Klamath Lake, and thus available

pendency of the rehearing petition, petitioners filed a letter under FRAP 28(c) to correct mischaracterizations by the Yurok Tribe in their opposition to rehearing, related to the same misstatements of the *Adair* decision. Letter of December 29, 1999.

On January 28, 2000, the Ninth Circuit issued an order adding to its opinion footnote 3, restating its recognition of Reclamation's power to allocate water to unadjudicated tribal claims, and leaving unchanged the factually erroneous statements in its opinion:

> 3. An adjudication of all of the rights to the use of the surface waters of the Klamath River Basin ("Basin"), within the State of Oregon, is now pending in state court. *See United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994). That is a comprehensive water rights adjudication contemplated by the McCarran Amendment, 43 U.S.C. § 666, and questions of relative amounts and priorities, at least within the State of Oregon, will be decided there. Our decision in this case and that of that district court relate only to questions involving the Bureau's operation and management of the Project, and not to the relative rights of others not before the court to the use of the waters of the Basin.

(Pet. App. 2a)

REASONS FOR GRANTING THE WRIT

Although this case arose from a dispute about whether petitioners are third party beneficiaries with rights against PacifiCorp under the 1956 contract for operation of the Link River Dam, the Ninth Circuit reached out to affirm

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for potential use by Klamath Project irrigators obtaining water from the Lake. A tribal right to a certain level of water in Klamath Lake would have the opposite effect of reducing the amount of water that may be removed from the Lake to meet irrigation needs.

Reclamation's authority, in controlling the operation of the Dam, to give priority to unadjudicated tribal claims, and in the process erred in two important and certworthy respects. First, it made an unsolicited judicial pronouncement on the general power of the Bureau of Reclamation to determine and allocate water based on unadjudicated tribal claims ahead of statutorily-recognized water rights of Klamath Project irrigators served through contracts. *See* note 2, *supra*. Second, the court declared the existence and specific priorities of certain tribal water rights, without any litigation or consideration of the relevant facts.

The United States and the Bureau of Reclamation, who were before the court in this case, at no time requested a declaration of their powers or obligations, under the 1956 contract or in general. No party ever pleaded a cause of action concerning the authority of Reclamation to operate the Dam in a manner recognizing unadjudicated tribal water rights to in-stream flows, or sought a determination of the existence or priority of any tribal rights. As a result, these issues were not litigated by the parties to the case, and no other parties—such as the State of Oregon—had notice that such issues might be resolved.

As this Court enunciated in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 819 (1976), the involvement of federal courts—or presumably federal agencies like the Bureau of Reclamation—in the determination of water rights, must proceed in recognition of "the availability of comprehensive state systems for adjudication of water rights." Indeed, as this Court has held, Congress expressly elected, in the Reclamation Act of 1902 and later enactments, to "defer to state law" in this area, and did so precisely because of "the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality." *California v. United States*, 438 U.S. 645, 669 (1978). While *Colorado River* did not announce

an inflexible rule against federal court involvement in determining water rights issues, it recognized a "clear federal policy," rooted in the McCarran Amendment, of avoiding "piecemeal adjudication of water rights in a river system." *Colorado River*, 424 U.S. at 819. That policy has been understood as a counsel of restraint to federal courts, requiring them to avoid determination of such rights, at least where, as here, there is an ongoing state stream adjudication, in the absence of strong counterveiling considerations. The fact that the water rights of Indian tribes may be at issue is not, in itself, a sufficient basis justifying the federal court to proceed. *Id.* at 812; *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 570 (1983).

In this case, there were no such counterveiling considerations which might arguably justify the Ninth Circuit in deciding issues relating to the Bureau's power or duty to recognize unadjudicated tribal claims, or to declare the existence and particular priority to be accorded to specific tribal water rights claims. Indeed, these issues were no part of the dispute before the court—a dispute between PacifiCorp and petitioners about whether petitioners had any claims against PacifiCorp under the 1956 contract concerning operation of the Dam. No one requested declaratory or other relief concerning the propriety of Reclamation's 1997 interim plan, and the specific priorities of the tribal claims are entirely unrelated to any claim that petitioners could conceivably have against PacifiCorp under the contract.[13] On the facts, the Ninth Circuit's inclusion of Section II.B.3 appears not even to be any part of the resolution

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[13] This is most emphatically true in view of Ninth Circuit's unequivocal rulings 1) that petitioners have no rights at all under the 1956 contract; and 2) that the Bureau of Reclamation ultimately controls the operation of the Dam. (Pet. App. 10a-11a)

of the justiciable controversy presented for decision.[14] Accordingly, the court has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Supreme Court Rule 10(a).

Moreover, the issues that the Ninth Circuit purports to resolve in Section II.B.3 are of great consequence, not merely to petitioners and others with water rights in the Klamath Basin, but to states throughout the West and to everyone who is dependent in their lives or livelihoods on vested rights to water. This Court has long since recognized that such rights—including those that are realized only through the vehicle of federal water projects—have the status of property belonging to the land-owners, and not to the Government simply because it owns the irrigation works. *Nebraska v. Wyoming*, 325 U.S. 589, 613-14 (1945) ("The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals" and belongs to the appropriator); *Ickes v. Fox*, 300 U.S. 82, 95 (1937) ("the water rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works.") Water rights of irrigators drawing from federal projects thus are not "like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit." *Nevada v. United States*, 463 U.S. 110, 126 (1983).

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[14] Certainly, the two issues addressed in Section II.B.3 were "not pressed before the court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests." *United States v. Fruehauf*, 365 U.S. 146, 157 (1961). The Ninth Circuit has thus ignored the admonition that "[t]he judicial power does not extend to the determination of abstract questions." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 324 (1936); *Muskrat v. United States*, 219 U.S. 346, 361 (1911).

I. The Ninth Circuit Has Decided An Important Question Of Federal Versus State Authority Concerning Determination Of Water Rights That Was Not Presented Or Litigated In This Case, And That Is Presently A Matter Of Open Discussion Between The Federal Government And The States

The power (and obligation) of the Bureau of Reclamation that the Ninth Circuit recognizes here, to give priority to unadjudicated tribal water rights claims, is highly disruptive to any predictable scheme for fairly regulating water rights in accordance with their legal priorities. The issue raises a substantial federalism question, between Reclamation's authority and that of the states, whose law, it was "clearly provided" in the Reclamation Act of 1902, "control[s] in the appropriation and later distribution of [project] water." *California v. United States*, 438 U.S. at 664.

The filing by the State of Oregon in support of rehearing before the Ninth Circuit is thus hardly surprising. Oregon might well have become involved sooner, had it not been clear that the issue of the Bureau's asserted power to recognize unadjudicated tribal rights was in no sense presented in this case. Oregon's prayer upon rehearing was a modest one—that the issue "of enormous significance," of "Reclamation's authority to allocate water within its projects to serve . . . tribal trust obligations," not be decided in a case where it is neither presented nor litigated by the parties. Oregon Br. at 9.

Oregon's request, which the Ninth Circuit rejected, is especially appropriate given the developing history of administrative interaction between responsible State and Federal agencies, which is framing the issue for a possible future judicial resolution. That history traces back to at least 1995, when, on July 25, the Department of Interior's Regional Solicitor for the Pacific Southwest Region, David Nawi, issued a legal memorandum of advice to the Bureau of Reclamation concerning its oversight of the Link River Dam. (Pet. App.

29a-41a) In the memorandum, he directed the Bureau to "exercise its statutory and contractual authority to the fullest extent to protect the tribal fisheries and tribal water rights," even though "[n]one of the rights [in issue] are quantified." (Pet. App. 41a)

Cognizant of that directive, on March 18, 1996, Oregon Assistant Attorney General Stephen E. A. Sanders wrote a letter to the Director of the Oregon Water Resources Department, directly challenging the conclusion of the Regional Solicitor asserting such power in the Bureau of Reclamation. (Pet. App. 42a-55a) Three primary grounds were advanced. First, the Assistant Attorney General noted that there was no statutory or other authority justifying Bureau action "to regulate water uses under the prior appropriation doctrine," and that the "purpose of the McCarran Amendment was to require federal and tribal participation in the states' water rights systems." (Pet. App. 48a) Second, he observed that the claimed rights in issue have not been adjudicated, and "regulation in favor of a water right necessarily requires a determination of what the right is." Citing *South Delta Water Agency v. United States*, 767 F.2d 531 (9th Cir. 1985). (Pet. App. 48a-50a)

Third, the Assistant Attorney General noted that, "[t]o be fair and effective, any system of regulation between rights in a prior appropriation system must necessarily include all holders of water rights," since in times of shortage junior users must give way to more senior users. (Pet. App. 50a) "The Bureau identifies no way that it can shut off junior users who are not under direct federal control, to satisfy the calls of senior appropriators. Only the state has [that] authority. . . ." (Pet. App. 50a-51a) As a result, he observed, Reclamation's asserted power would result in the Klamath Project irrigators being subordinated to a variety of more junior users who are affected by federal control of the Dam.

On January 9, 1997, Regional Solicitors' Nawi and Lynn Peterson (for the Pacific Northwest Region) responded directly to Assistant Attorney General Sander's letter, which they said was "in wide circulation and may be read as calling into question the legal basis for various federal actions to manage the Project." (Pet. App. 56a-70a) The Regional Solicitors agreed that the subordination of junior users would "best comport[] with the priority system of water rights administration." (Pet. App. 63a) They nonetheless justified the prior directive, on their view that Oregon, pending its stream adjudication, was declining to "protect[] senior water rights [including those asserted rights of the Tribes]," and the "March 18 letter offer[ed] no avenue or mechanism for effecting calls on junior uses." (Pet. App. 63a)

It is extremely noteworthy that despite this climate of express disagreement, neither the United States nor Oregon has yet sought a judicial resolution of the dispute concerning Reclamation's authority. Certainly neither undertook to put this hotly contested issue before either the district or the appellate court for a considered decision in this case. Consequently, the district court properly did not address the issue. The court of appeals, however, forged ahead—evidently at the invitation of the Yurok intervenors who had failed to lodge a claim for any relief—and issued what can only be characterized as an advisory opinion.

Section II.B.3. of the court's opinion, which is devoid of any analysis, explicitly endorses Reclamation's authority —indeed its "responsibility"—to subordinate the rights of petitioners to the unadjudicated water rights of Klamath Basin Tribes in its 1997 interim plan. (Pet. App. 12a) The effect of this overreaching is to deny any opportunity for interested parties to litigate this complex and important question of law

prior to its determination by a circuit in which it has great significance.[15]

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[15] There are a number arguments, some much discussed in the decisions of this Court, which petitioners or the State of Oregon could have raised had they known the court of appeals was going to decide this issue. On a factual level, of course, they could have challenged the historic and hydrological assumptions underlying Reclamation's allocation of water to the Tribes. More fundamentally, in addition to the points referenced above from the Oregon Assistant Attorney General letter of March 18, 1996, they could have asserted that Reclamation's exercise of such authority is inconsistent with the Act's basic principle that Reclamation programs must not "in any way interfere with laws of any State or Territory relating to the control, appropriation use or distribution of water used in irrigation, or any vested rights acquired thereunder," 43 U.S.C. § 383, and with the McCarran Amendment's recognition of the primacy of state law in defining and administering water rights. *See Nevada v. United States*, 463 U.S. at 122; *California v. United States*, 438 U.S. at 664-69, 678-79.

They could also have pointed out the layers of procedural conundra raised by recognizing such authority in the Bureau of Reclamation. For example, is Reclamation's action in allocating water to unadjudicated tribal rights subject to the same trial-type due process protections that apply where such rights are determined by state adjudication? *See United States v. Oregon*, 44 F.3d at 764-65. Is Reclamation's action subject to judicial review? If so, is that review properly conducted in federal court, or, in view of the McCarran Amendment and this Court's decisions, in state court? Is any decision reached in such judicial review of Reclamation's interim allocation of water binding on a subsequent state court stream adjudication, and if so how does that square with the acknowledged policy disfavoring piecemeal determination of water rights issues, *Colorado River*, 424 U.S. at 819. If such review is possible in either court, how does one reconcile the problem of potential parallel proceedings addressing the same water rights issues?

II. The Ninth Circuit Has Erroneously Characterized The Priority Of Certain Claimed Tribal Water Rights In A Case Where The Issue Was Neither Presented Nor Litigated By The Parties, Based On An Indisputable Misreading Of Its Own Prior Decision In *United States v. Adair*

Section II.B.3 of the Ninth Circuit's decision severely undermines the reliability of water rights within the Klamath Basin in a more concrete and specific way. By endorsing Reclamation's particular exercise of its newfound power in its interim plan for 1997, and by its express mischaracterization of the previously determined water rights of the "Klamath Basin Tribes," the Ninth Circuit created a federal court decision describing certain tribal rights in a wholly unsupportable manner. Such a result is hardly surprising where it is reached without aid of pleadings, evidence, briefing or argument on the subject.

Contrary to the panel's assertion, *Adair* did not determine the rights of "the Klamath Basin Tribes . . . in Oregon and California"—which tribes include the Yuroks and Hoopas of California. It only addressed the interests of the Klamath Tribe, and only within the Williamson River watershed in Oregon. (*See* Pet. App. 27a) Also contrary to the panel, there is no holding, in *Adair* or any other decision, to the effect that the Yuroks and Hoopas have any right to water, let alone a right with a priority date of time immemorial.[16] Likewise,

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[16] The panel made an important factual error in referring to "hunting and fishing rights guaranteed by treaties between Tribes in . . . California and [the] United States," (Pet. App. 12a), since the United States has no treaties with these Tribes. Whatever rights to instream flows the Yuroks and Hoopas may have—and no court has addressed that issue—they are the result not of treaties, but of executive orders granting rights to the Tribes. *See Mattz v. Arnett*, 412 U.S. 481, 485-94 (1973) (describing the history of the Yurok and Hoopa reservations in California). This fact is highly significant as a distinction from the facts of *Adair*, where the

Adair did not address the issue of the Klamath Tribe's claimed right to insist on certain water levels in Upper Klamath Lake, and thus provides no basis for the panel's endorsement of Reclamation's interim plan insofar as the plan recognizes that claimed right. *See Adair*, 723 F.2d 1394, 1398 (recognizing tribal water rights in an area not including Upper Klamath Lake). Innumerable issues of fact and law exist with respect to each of these claimed rights.

In perhaps the most objectionable sentence of the section, the court stated that Reclamation "has a responsibility to divert the water and resources needed to fulfill the Tribe's rights, rights that take precedence over any alleged rights of the Irrigators." (Pet. App. 12a-13a)[17] These words, coupled with the statement that the rights of the Klamath Basin Tribes run from "time immemorial," will almost certainly be read to state that all of the tribes of the Basin, in both states, have rights to instream flows that are senior to those of the irrigators. There is also a high risk that the Ninth Circuit's ruling on a question involving federally-based tribal water rights will be viewed as binding in the current state stream adjudication, or in

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reservation was created by treaty. A treaty "is not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." 723 F.2d at 1412-13 (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)). The same is not true of a statute or executive order, and the decisions of this Court indicate that when an implied water right is reserved through statute or executive order creating a reservation, its priority date is that of the statute or order. *Cappaert v. United States*, 426 U.S. 128, 138-39 (1976); *Arizona v. California*, 373 U.S. 546, 595-60 (1963). This Court has never recognized a tribal water right with a priority of time immemorial.

[17] The panel's reference to "a responsibility to divert the water . . . needed to fulfill the Tribes' rights" belies another fundamental misunderstanding. (Pet. App. 12a) The claimed right to instream flows is, in essence, a right that the water *not* be diverted, but rather left in the river.

subsequent litigation involving the downstream portion of the river in California.

Such a result would be objectionable not only because of the way it was arrived at—unnecessarily, without benefit of litigation, based on a misreading of *Adair*—but also because it appears to be substantively wrong. Indeed, both the Yuroks and the United States have admitted that there is substantial room for disagreement as to the actual priority date of the asserted rights. The Yuroks themselves have characterized their rights as having a priority of "either time immemorial or . . . 1855 or 1891 at the latest." Yurok Tribe's Opposition to Plaintiff's Motion for Summary Judgment at 6; FER 119; *see also* Yurok Br. to Ninth Circuit at 43 ("aboriginal water and fishing right [was] reserved and vested no later than 1855.") According to the United States, "[t]he priority date of the Yurok and Hoopa water rights are at least as early as 1891, and may be earlier." (Pet. App. 37a) Regional Solicitor's Memorandum to the Bureau of Reclamation; U.S. SER 29. Petitioners question both the existence and scope of the claimed rights, and even the Yurok Tribe and the United States are at best equivocal in their support for the priority recognized by the Ninth Circuit.

Thus, the errors embodied in Section II.B.3 of the decision below may well have a real practical impact on the availability of water to petitioners. Irrigation water rights were initiated in the current Klamath Project service area well before the advent of the federal project. Petitioners (and the United States itself) in the currently pending Klamath adjudication, have filed claims of water rights for irrigation that are *prior* to 1891. ER 556, 564; ER 546, 548, 552, 554. If confirmed in the adjudication, these irrigation rights will be senior to any tribal right having an 1891 priority, a priority advanced by the advocates asserting the tribal right. The Ninth Circuit opinion, however, stands as a decision to the contrary, that "the Tribes' rights . . . take

precedence over any alleged rights of the Irrigators." (Pet. App. 12a-13a)

Apart from that, as pointed out by Oregon Assistant Attorney General Sanders in his March 18, 1996 letter, Reclamation's intervention in allocating water to unadjudicated tribal claims completely disrupts the orderly administration of water rights. Elsewhere in the Klamath Basin, there is a considerable amount of irrigated agriculture not associated with the Reclamation project, including lands upstream of Upper Klamath Lake as well as downstream, in the Shasta and Scott River valleys. (*See* Pet. App. 27a) The rights of many of these users are junior to petitioners, but because they do not rely for their water on federally-created facilities, they can continue to use water freely. Reclamation's intrusion into the area of water allocation thus means that petitioners are effectively pushed to the back of the line, behind not only the tribal claims but the claims of junior irrigators as well.

This case thus presents an instance of transparent judicial error in a context requiring the attention of this Court. On many occasions, this Court has stepped in to give plenary review to questions falling at the juncture of federal, state and tribal rights and powers. *E.g.*, *Rice v. Rehner*, 463 U.S. 713 (1983) (California may require federally licensed Indian trader to secure state license to sell liquor on reservation); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (Arizona taxes on logging activities on reservation held preempted); *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 (1960) (FPC could grant dam license to New York State Power Authority allowing state to condemn Indian lands for reservoir).

In this instance, petitioners submit that the Ninth Circuit's inclusion of Section II.B.3 in its opinion affirming a narrow issue of contract construction is obviously unnecessary, erroneous, and contrary to the spirit of *Colorado River*, and that the court has "so far departed from the accepted and usual

course of judicial proceedings" as to call for summary reversal, in exercise of this Court's supervisory powers. Supreme Court Rules 10(a), 16.1.[18]

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[18] The panel's addition of footnote 3, *see* p.p. 11-12, *supra*; (Pet. App. 13a), following the petition for rehearing, does nothing to ameliorate any of the problems identified here. First, in its final sentence, it repeats and emphasizes the court's intention to resolve the important and unlitigated question of the Bureau's authority to allocate water to unadjudicated tribal claims. Second, by referencing the on-going Oregon stream adjudication which will decide "questions of relative amounts and priorities, at least within Oregon," and denying any intention to determine here "the relative rights of others not before the court," the panel appears also to confirm its intention to uphold the Yurok and Hoopa Tribe water rights priorities administratively recognized by Reclamation. Because they are located in California, those Tribes have filed no claims in the pending Oregon adjudication, and the Yuroks, at least, were a party "before the court" in this case. Most importantly, as the court seems not to understand, it is in the nature of water rights that affirmance of the Bureau's allocation of water rights between only a few of the many claimants to the exact same water, without addressing "the relative rights of others not before the court," is completely disruptive of the state law prior appropriations water rights scheme that takes precedence under this court's decisions. *California v. United States*, 438 U.S. at 669.

CONCLUSION

The petition for writ of certiorari should be granted, and an order issued directing that Section II.B.3 of the decision below be vacated.

Respectfully submitted,

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